IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Criminal Appeal No. 1593 of 2001
(Old No. 2876/1984)

1. Kalbe Ali S/o Bhurey
   R/o Village Maseet
   P.S. Gadarpur, District Nainital
2. Anwar Hussain, S/o Altaf Hussain
   R/o Village Maseet,
   P.S. Gadarpur, District Nainital .....Appellants

Vs.

State of Uttaranchal .....Respondent

Sri J.C. Gupta learned Senior Advocate for appellant no. 1
Sri Dharam Veer learned Advocate for appellant no.2
Sri D.K. Sharma learned G.A.

Coram :- Hon'ble Irshad Hussain, J.
Hon'ble J.C.S. Rawat, J.

Dated :- 27th July, 2004

ORAL JUDGMENT (Per :- Hon'ble Justice J.C.S. Rawat)

This is a criminal appeal under Section 374 of the Code of Criminal Procedure (for short 'Code') against the judgment and order dated 29.9.1984 passed by the Sessions Judge, Nainital in S.T. No. 207/1982 convicting the appellant no. 1-Kalbe Ali under Section 302 IPC and appellant no.2-Anwar Hussain under Section 302/34 IPC and sentenced them to undergo life imprisonment.

2. The brief facts giving rise to the present appeal are that Ashfaq Hussain-deceased was the younger brother of Mohd. Ishaq (PW-1) and Smt. Sharifan (CW-1) was the wife of the deceased. Shafi Ahmed (PW-2) was the real brother of Smt. Sharifan and before her marriage with Ashfaq Hussain, Smt. Sharifan was married to one Abdul Rehman. After her divorce from first husband-Abdul Rehman, the marriage between Ashfaq Hussain and Smt. Sharifan had taken place about a year before the incident. After marriage, they were living together in village Maseet.

The appellants-accused were also living in the same village and they were related to each other. Smt. Sharifan's father had left about 20 acres of land at the time of his death. Ashfaq Hussain was cultivating the same land after his marriage with Smt. Sharifan.

3. Appellant-Kalbe Ali had told Smt. Sharifan to marry with him otherwise Ashfaq Hussain would sell away the entire property. She got annoyed with Kalbe Ali and complained to Ashfaq Hussain. The appellant-Kalbe Ali also asked Ashfaq Hussain to pay half of the price which was obtained by him by selling the land.

4. On 11.6.1982 at about 9:45 to 10 PM when Ashfaq Hussain alongwith Mohd. Ishaq (PW-1) and Shafi Ahmed (PW-2) were going to irrigate his fields and reached near the Pilkhan tree situated outside the house of Kalbe Ali, they found that the appellants were sitting under the tree. Kalbe Ali, who was armed with a rifle fired a shot which hit the victim-Ashfaq Hussain who fell down spontaneously. The accused were identified in the moon light and by their voice. Hearing the gun shot, Nazakat Ali (PW-4) and Muzaffar Ali (PW-3) the neighbours of the appellants came out from their respective houses and found both the appellants were dragging the body of Ashfaq Hussain to Kalbe Ali's house and accused then threatened not to come forward. Due to fear none could dare to go to the house of appellant Kalbe Ali.

5. Thereafter, a report (Ex.Ka.1) was dictated by Mohd. Ishaq (PW-1) to scribe Nazakat Ali (PW4) and the same was handed over to the Head Constable Jai Prakash (PW-9) at the police station. On its basis, the check report (Ex.Ka.9) was prepared and an entry to that effect was made in the G.D., the copy of which was Ex.ka.10. S.I.- Laxmi Ram Arya (PW-10) was present at the police station when the case was registered on 11.6.1982. The I.O. started the investigation immediately after registration of the case and the statement of Mohd. Ishaq (PW-1) was recorded at the police station. On 12.6.1982 the I.O. reached the scene of occurrence and took the samples of the plain and blood stained earth from the place where the dead body of Ashfaq Hussain was lying inside the

house of appellant Kalbe Ali (sealed in two tins material Exs. 7 & 8 under recovery memo Ex.ka.4). A pair of Chappal material Ex.5 under recovery memo Ex.ka.5, sample of plain & blood stained earth from the place where the shot was fired (sealed in two tins material Exts. 9 & 10 under the recovery memo Ex.ka.6) and sight protector of rifle (material Ex.11 under the recovery memo Ex.ka.7) were taken into possession. But the accused was not arrested at that time. The inquest report (Ex.ka.1) was prepared on 12.6.1982 in the presence of the witnesses. The photo lash (Ex.ka.12), Challan lash (Ex.ka.13) and other documents were also prepared by the I.O. Thereafter the dead body was sent to Kashipur Hospital for postmortem. The I.O. also inspected the scene of occurrence and recorded the statement of the witnesses under section 161 Cr.P.C. on 12.6.1982 at about 8 PM, the I.O. arrested the accused-Kalbe Ali from his house and recovered one licenced rifle .315 bore (material Ext.12), two used catridges (material Exts.13 & 14) and one cartridge belt (material Ext. 15) containing 15 live cartridges (material Exts. 16 to 30). The rifle alongwith other articles were sent to Ballistic Expert and Chemical Examiner for examination. The I.O. submitted the charge-sheet (Ex.ka.17) on 29.8.1982.

6. The charges under Section 302 IPC and 302/34 IPC were framed by the learned Sessions Judge against the appellant Kalbe Ali and Anwar Hussain respectively. The appellants denied the charges and claimed the trial.

7. In order to prove its case, the prosecution examined twelve witnesses and filed affidavit of Sri Jai Prakash police constable with regard to formal evidence. Mohd. Ishaq (PW-1) and Shafi Ahmed (PW2) were the eye witnesses of the incident. They stated that they were going with Ashfaq Hussain on 11.6.1982 at about 9:45 to 10 PM to irrigate the fields of the deceased. When they reached near the Pilkhan tree situated outside the house of Kalbe Ali, they saw the appellants sitting under the tree. Kalbe Ali was armed with his rifle. At that time Shafiq Ahmad (PW-2) was carrying spade while Ashfaq Hussain and Mohd. Ishaq were not carrying anything in their hand. Anwar Hussain co-accused then exhorted

Kalbe Ali to shoot. On this, appellant Kalbe Ali fired a shot on Ashfaq Hussain. Ashfaq Hussain was hit by the bullet and fell down. Upon their hue and cry, Nazakat Ali (PW4) and Muzaffar Ali (PW-3), who are the neighbours of the accused-Kalbe Ali came there. They were carrying torches in their hands. Both these witnesses flashed their torches towards the passage which passes in front of their houses. Muzaffar Ali (PW3) and Nazakat Ali (PW4) claimed that they saw the appellant Kalbe Ali armed with the rifle at that time. Muzaffar Ali (PW3) further deposed that Mohd. Ishaq (PW1) and Shafi Ahmed (PW2) were standing thereby and shouting that their brother has been shot.

8. Muzaffar Ali (PW3) and Nazakat Ali (PW-4) stated that both the appellants were dragging the dead body of Ashfaq Hussain towards Kalbe Ali's house. Kalbe Ali threatened them not to come forward and in case anyone comes forward he would be shot dead. Then the body of Ashfaq Hussain was dragged to the "varanda" of Kalbe Ali by the appellants. Inside his house Kalbe Ali again fired some shots. The witnesses could not dare to got to the house of Kalbe Ali due to fear.

9. The prosecution has produced Mohd. Ali as PW-6. He had stated that a year ago one Sub-Inspector had come to his village and he was called by him at the house of Afsar Ali. He had also stated that at the house of Afsar Ali appellant Kalbe Ali was also called by the police and the rifle and cartridges were taken in possession by the S.O. from Kalbe Ali in his presence. He has also stated that Ex.ka.2 was not scribed in his presence although it was signed by him. He has also stated that no used cartridges were recovered in his presence. The prosecution has also adduced the evidence of Rais Ahmed (PW-7), who stated that nothing was recovered by the police in his presence in relation to the case. Both these witnesses were declared hostile by the prosecution. These witnesses had not supported the prosecution regarding the recovery of the articles from the house of appellant Kalbe Ali. The evidence of PW-6 and PW-7 is of no avail to the prosecution. The learned Sessions Judge also discarded their evidence.

10. Dr. R.N. Singhal (PW-8) has conducted the postmortem of the dead body of the deceased on 12.6.1982. He stated that the dead body of the deceased was produced before him in a sealed cover and opined that the deceased was aged about 28 years and the deceased had been dead for about half a day and the death of the deceased would have been caused on 11.6.1982 at about 10 PM. The rigor mortis was present in the body and the medical officer found the following ante-mortem injuries on the dead body:-

a) Gun shot wound of entry, 2cm x 2cm. X chest cavity deep, present over the left side of chest, back side at the posterior axillary line 12 cm below the inferior angle of scapula. Blood was oozing from the wound. Blackening around the wound was present. The direction was medially upward and forward.

b) Gun shot wound of exit 2.5 cm x 1.5 cm present over right side of front of chest 5.5 cm above right nipple, third, fourth and fifth ribs on right side fractured.

c) Gun shot wound of entry 2.5 cm x 2.5 cm present over middle side of right arm 3 cm below right axilla. The direction was laterally upward and forward.

d) Gun shot wound of entry 1 cm x .5 cm present over medial side of right arm .5 cm below injury no.3. The direction was laterally upward and forward.

e) Gun shot wound of exit 3 cm x 2.5 cm present over outer side of right arm upper one third, 3 cm below acromial process of right scapula. Pellet recovered from the wound and sealed. Injury is communicated with injury nos. 3 and 4.

f) Contusion 3 cm x 2 cm present over right of gluteal region.

11. The opinion of the Medical Officer with regard to the internal examination was that the brain and membranes were congested; the 3rd, 4th and 5th ribs on the right side were fractured; the chest was congested; both the lungs & heart were lacerated and semi digested food was present inside the stomach.

12. In the opinion of Dr. R.N. Singhal, the death of Ashfaq Hussain was caused due to shock and haemorrhage resulting from the ante-mortem injuries. He also proved the postmortem report (Ex.ka.8).

13. Head constable Jai Prakash (PW-9) proved the chick report (Ex.ka.9) and the entry G.D. (Ex.ka.10) about the commission of the crime.

14. S.I. Laxmi Ram Arya (PW-10) was posted as S.O. at P.S. Gadarpur and he was the Investigating Officer of the case. When the case was registered, he was present at the police station and started the investigation immediately after registration of the case. The investigation was taken up as usual which culminated into the submission of the chargesheet against the accused appellants.

15. The prosecution has also examined Ram Asre Pande as PW-11, who was the Ballistic Expert. He has stated that the used cartridges (Ex.1 & Ex.2) were fired from the rifle Ex.12. He had himself stated that it was not possible to give any definite opinion regarding the piece of lead but it was likely that the piece of lead in question was a part of the cartridge which was fired from the rifle in question. He proved his report Ex.ka.18 and photograph Ex.37 to 42.

16. S.I. Hira Singh Negi (PW-12) has corroborated the evidence of Laxmi Ram Arya (PW-10) on the question of arrest of the appellant-Kalbe Ali on 12.6.1982 and the recovery of one licenced rifle and two used cartridges and one cartridge belt containing 15 live cartridges etc from the house of appellant Kalbe Ali. He has also stated that the

foresight protector was missing from the rifle (Ex.12). He also proved that the recovery memo Ex.ka.2 was prepared at the spot.

17. Smt. Sharifan was examined under section 311 Cr.P.C. by the court. Mohd. Ishaq PW1 had stated that the appellant-Kalbe Ali had asked her to marry with him otherwise after the death of her father, Ashfaq Hussain would sell the entire property which belongs to her father. He further sated that Smt. Sharifan (CW1) became annoyed and had complained to Ashfaq Hussain about the conduct of Kalbe Ali. He has also stated that Ashfaq Hussain had remonstrated with Kalbe Ali as to why he had talked with Smt. Sharifan (CW1) in this regard and at that time appellant Kalbe Ali had demanded his share in the price of the land which was sold away by Ashfaq Hussain. Smt. Sharifan (CW1) stated that before the murder of her husband-Ashfaq Hussain, the appellant-Kalbe Ali did not have any conversation with her. The appellant-Kalbe Ali did not lead any evidence in their defence.

18. The learned Sessions Judge on his appreciation of the evidence on record held that the prosecution evidence had clearly established that the appellant Kalbe Ali fired shot on Ashfaq Hussain on the exhortation of appellant Anwar Hussain. The learned Sessions Judge had further held that Kalbe Ali was guilty of offence punishable under section 302 IPC. Anwar Hussain exhorted Kalbe Ali to kill Ashfaq Hussain-deceased. After Ashfaq Hussain fell down on being hit by bullet, Anwar Hussain joined Kalbe Ali in dragging the deceased inside the house of appellant Kalbe Ali. The learned Sessions Judge held that appellant Anwar Hussain and Kalbe Ali had a common intention to commit the murder and as such Anwar Hussain was guilty of the offence punishable under section 302/34 IPC.

19. We have heard Sri J.C. Gupta & Sri Dharam Veer Sharma learned senior counsel for the appellants and Sri D.K. Sharma learned G.A. on behalf of the State. We have also gone through the evidence and material on record.

20. The learned counsel for the appellants contended that the prosecution has failed to prove the case against the accused-appellants beyond reasonable doubt and the evidence adduced by the prosecution is not sufficient to prove the charge against the appellants. The contentions of the defence was refuted by the learned G.A.

21. Mohd. Ishaq (PW-1) and Shafi Ahmed (PW-2) were the eye witnesses of the incident. Mohd. Ishaq (PW1) and Shafi Ahmed (PW2) stated that they alongwith Ashfaq Hussain were going towards the fields to irrigate the paddy crop. When they reached near the 'Pilkhan' tree near the house of appellant Kalbe Ali, they saw the appellant sitting under the tree. It was a moon lit night. The appellant Kalbe Ali had a rifle in his hand. On the exhortation of appellant Anwar Hussain, Kalbe Ali fired a shot on Ashfaq Hussain-deceased, who fell on the ground on sustaining the fire arm injury. PW1 and PW2 also stated that thereafter both the appellants dragged deceased-Ashfaq Hussain inside the house of the appellant Kalbe Ali. The appellants were recognized by the witnesses in moon light and also by their voice. Mohd. Ishaq (PW-1) was the real brother of the deceased while the PW-2, Shafi Ahmed was the real brother of Smt. Sharifan (CW-1) – the wife of the deceased. Whenever the villagers go to irrigate their fields in the night generally they do not go alone, they take one or two persons together in the night in the plains. The deceased was also accompanied by Mohd. Ishaq (PW-1) and Shafi Ahmed (PW-2) who were the close relatives of the deceased. Thus, their presence at the spot is natural.

22. Muzaffar Ali (PW-3) and Nazakat Ali (PW-4) have categorically stated that they were inside their respective houses at the time of incident and came out on hearing the noise of rifle shot. Muzaffar Ali PW3 was carrying a torch and flashed it towards the passage which passes in front of his house. He claimed that he saw the appellant-Kalbe Ali armed with rifle at that time and both the witnesses Mohd. Ishaq (PW-1) and Shafi Ahmed (PW-2) were then standing nearby and were shouting that Ashfaq

Hussain had been shot dead. Both the appellants were seen dragging the deceased towards the house of the appellant-Kalbe Ali. On alarm being raised by the Muzaffar Ali (PW3) and Nazakat Ali (PW4), the appellant Kalbe Ali threatened them. Muzaffar Ali (PW-3) and Nazakat Ali (PW-4) also claimed that their houses are adjacent to each other, and in front of the house of appellant-Kalbe Ali and only a 'kuchha lane' separate the house of the Kalbe Ali. Thus, the presence of these witnesses was natural at the time of incident. The statements of all the four witnesses as indicated above are consistent and there are no variations or contradictions in their statement on the material points. It was natural that Muzaffar Ali (PW-3) and Nazakat Ali (PW-4) would come out from their respective houses on hearing the gun shot. Moreover, they could have also claimed that they were also present in the lane and saw the appellant-Kalbe Ali firing shot on the deceased but these witnesses had not stated a word as to who had fired the shot and they truthfully deposed about that event of the incident which they had seen.

23. The evidence of Mohd. Ishaq (PW1) found corroboration from in the FIR which was lodged at the police station with due promptness. The FIR came into existence with promptness which ruled out any occasion for outside consultation or manipulation. The occurrence took place at 10PM and the FIR was lodged at 11:05 PM in P.S. Gadarpur which is at a distance of 6KM from the scene of occurrence. He composed the FIR and got it scribed by Nazakat Ali and he had traveled 6KMs on a cycle. Keeping in view the above circumstances, the report was lodged promptly.

24. The evidence of the prosecution also stand corroborated from the medical evidence. According to PW8, Dr. R.N. Singhal, there were five gun shot injuries on the person of the deceased. The medical officer had opined that the death of Ashfaq Hussain was caused due to shock and haemorrhage resulting from ante-mortem injuries. Dr. R.N. Singhal had further stated that the death of the deceased would have been caused on

11.6.1982 at about 10PM. Thus the time of death and cause of death was also corroborated by the medical evidence.

25. It was further contended that there were five rifle shot injuries, out of which one wound of entry had been shown on the left side of the chest, back side at the posterior axillary line 12cm below the inferior angle of scapula. There was blackening around the wound and the gun shot injury no. 2 was on the right side of front of chest, 5.5cm above right nipple. The fourth gun shot entry wound was over and middle side of right arm, 0.5cm below injury no.3 and fourth gun shot wound of exit right arm below acronial process of right scapula. Pellet was recovered from the wound. The third, fourth and fifth ribs on right side were found fractured. The third gun shot injury was found over middle side of right arm below right axilla. The learned counsel for the defence contended that these gun shot wound were the result of only one gun shot. He submitted that the bullet entered from the backside of the chest causing blackening around the wound. The bullet then came out from the front side of the chest and the same bullet again entered into the right arm and came out from the backside of the arm. The ocular testimony clearly reveal that the appellant-Kalbe Ali shot fired on the deceased in the land which was in front of appellant's house and then the deceased was dragged towards the house of Kalbe Ali by the appellants. Muzaffar Ali (PW-3) and Nazakat Ali (PW-4) have categorically stated that they heard the sound of two gun shots. The witnesses had not stated that they saw Kalbe Ali firing shots on the deceased. The possibility could not be ruled out that subsequent to the incident two shots were fired to create terror so that none could enter the house. Thus the medical evidence clearly corroborate the prosecution witnesses and all the injuries were most probably be caused by one gun shot. It was further found that the rib nos. third, fourth and fifth were found fractured and the bullet might have been broken into pieces and had again entered into the right arm and caused injury nos. 2, 3 &4. Pellet recovered from the gun shot injury no. 5 was probably the piece of the same bullet, which had broken into pieces. The Ballistic Expert Ram Asre Pande (PW-11) had stated that no definite opinion could be given

regarding the piece of lead but it was likely that the piece of lead in question was a part of cartridge (bullet) which was fired from the riffle. Thus the report of the expert also do not rule out the possibility that this piece of lead could be a piece of lead of bullet fired by the riffle wielded by the appellant-Kalbe Ali.

26. The learned counsel for the defence also referred the statement of Medical Officer (Dr. R.N. Singhal-PW8) in which he has stated that there were five gun shot injuries and one contusion on the person of the deceased. He further deposed that all injuries were ante-mortem while according to PW-1 the dead body was dragged towards the accused-Kalbe Ali's house. If it was so, there should have been the multiple contusions and abrasions on the person of the deceased but there were no multiple contusion or abrasion on the person of the deceased except one contusion injuries no.6. It was further contended that the medical evidence did not corroborate the testimony of the eye witnesses. It is not necessary that the injury might occur on the person of the deceased as a result of the dragging. It has been held in Alla China Apparao and others Vs. State of A.P. 2002 (2) SCC p440:-

> *"8. Learned counsel then submitted that according to the evidence of PWs 1 to 4 the deceased was dragged to some distance and the latter portion of the incident had taken place thereafter, but curiously enough neither any dragging marks were found at the place of occurrence nor was nay injury found on the person of the deceased as a result of dragging. While considering this submission, the trial court observed that:*
>
> *It is true that PWs 1 to 4 unanimously deposed that the deceased was dragged to a dilapidated all and thereafter all accused inflicted injuries and major portion of the incident took place there itself. But it is also pertinent to note that the distance to which the accused dragged the deceased. It was elicited in the cross examination of PW-1 and other witnesses that the deceased was dragged to 4 to 5 yards. PW-1 says the distance as 5 to 6 yards while PWs 2 to 3 say it as three yards. Thus it indicates that the*

deceased Basari Sankararao was dragged for about 3 to 4 yards and it is a hard-surface road. In such a case there is no possibility to form dragging marks or dragging injuries as the deceased was dragged only to a maximum distance of 4 or 5 yards and when the person was dragged to such a distance, there may not be any injuries and therefore the contention raised on behalf of the accused that there are no injuries by dragging or otherwise do not render any assistance to their contention.

In our opinion, the view taken by the trial court was a reasonable one, as such the High Court was quite justified in not taking this to be a ground for doubting the truthfulness or otherwise of the prosecution case."

27. S.O. Laxmi Ram Arya (PW10) had proved that a foresight protector of rifle was recovered from the place where the shot was said to have been fired. The dead body of the deceased was recovered from the house of the appellant-Kalbe Ali. This fact further corroborate that the incident occurred outside the house of the appellant Kalbe Ali and the dead body of the deceased was dragged from the place of incident to the house of appellant Kalbe Ali.

28. The learned counsel for the appellants referred the statement of Mohd. Ishaq (PW-1) that the deceased had already started to irrigate his field during the day time. Shafi Ahmed (PW2) stated in his cross examination that they were going to irrigate the field for the first time in the night. The learned counsel for the defence contended that there is a material contradiction on the point as to whether the deceased, accompanied by Mohd. Ishaq (PW1) and Shafi Ahmed (PW2) was going to irrigate the field for the first time in the night or the field had already been irrigated in the day. There is no contradiction in the statement of the witnesses if we go through the statement of the witnesses. Mohd. Ishaq (PW-1) had stated that the field had already been irrigated during the day. During the cross examination, Mohd. Ishaq (PW-1) stated that he did not accompany the deceased in the day to irrigate the field. Mohd. Ishaq

(PW-1) got the impression that the field had already been irrigated and he alongwith Shafi Ahmed (PW-2) went to see whether the water was running properly in the field or not.

29. The learned counsel for the defence then referred the evidence of Shafi Ahmed (PW-2) that there was no occasion for him to accompany the deceased as he had to supervise the arrangement of loudspeaker in the village and he had to start the loudspeaker after 10PM in the night. Shafi Ahmed PW2 was under the impression that he would be back within a short time and thereafter he would be free for arrangement of loudspeaker in connection with this business affair of giving on hire loudspeaker.

30. The learned counsel for the appellants has further contended that the witnesses had claimed in their evidence that they had seen and recognized the appellants in the moon light and also by their voice. It was no where mentioned in the FIR and statement under section 161 Cr.P/C. that the occurrence was witnessed in the moon light and the accused were also identified by the witnesses by their voice. This fact is not of much significance because it was not expected to mention the minor details in the FIR when informant's real brother was hit by gun shot and died spontaneously. So far as the contention of insignificant light is concerned, we may indicate that in the open area of pathway adjoining to A*ngan* of the appellant on a cloudless starry night, there would be no difficulty in identifying the known person from close distance. This apart, it has to be kept in mind that there was no difficulty in identifying the assailants because of existence of some moon light with which the identification was possible. According to Panchang, it was the forth day of "krishan paksha" and the moon would have risen at about 8:30 PM. The eye witnesses were close to the appellants and as such there was no difficulty for them to identify the appellants. It has been observed in Shiv Raj Bapuray Jadhav Vs. State of Karnataka 2003 SCC (Cri) p/1372.

> *"The submission that the occurrence was two days prior to the new moon day and, therefore, the ocular witnesses could not have witnessed the occurrence as they claimed to have, does not*

appeal to us for the reason that not only, as noticed by the High Court, the parties are used to living in the midst of nature and accustomed to live without light, the parties could have been identified easily not only from the voices but from the fact they are known persons and close relatives and living in the neighbouring huts."

31. The learned counsel for the appellants had also referred the evidence of Shefi Ahmed (PW-2) and Muzaffar Ali (PW-3) who had stated then both PW-3 and PW-4 were carrying the torch in their hand. Muzaffar Ali (PW-3) and Nazakat Ali (PW-4) came out from their houses on hearing the gun shot noise and they were carrying torches in their hands. On the other hand, Nazakat Ali (PW-4) had stated that he was not carrying the torch at the time of the incident. He further stated that only Muzaffar Ali (PW-3) was carrying torch at that time. This contradiction is not material because the witnesses were terrified due to the death of the deceased. It was the natural conduct of the witnesses who were present at the spot that they would have a total concentration towards the death of the deceased and not on the witnesses as to whether both have torch or one of them were carrying the torch. It may also be possible that only Muzaffar Ali (PW-3) was carrying the torch at the time of the occurrence and PW-1 Mohd. Ishaq got the impression that both the witnesses were carrying with them the torches. This minor contradiction is not of any significance and do not assail the credibility of the prosecution witnesses.

32. The learned counsel for the defence has referred certain variations in the statements of the prosecution witnesses with regard to the distance of the place of incident. It is not disputed that there was Pilkhan tree outside the house of appellant Kalbe Ali. There was a pakka kharanja (pathway) towards the north of the Pilkhan tree. There was a kachcha lane in the east of the Pilkhan tree. This runs north to South. The house of the appellant Kalbe Ali was situated towards south of the Pilkhan tree and each of the kachcha lane. The site plan shows that the appellant-Kalbe Ali fired shot in the kachcha lane in front of his house. The prosecution

witnesses sometimes had stated that he place of incident was in the pacca kharanja or near the chauraha wereh the kharanja and kachcha lane conjoining with each other. The incident took place in the night at about 10PM. It was a moon lit night. The witnesses would vary to notice the distance in paces but the place of incident is definitely in front of the house of the appellant Kalbe Ali. It is quite natural that the persons narrate the story in different ways and in different words at different times. The witnesses were the villagers and they had their won notions about the distance. The incident took place at about 10PM, thus the eye witnesses were not expected to be very exact about the distance. In these circumstances, these normal discrepancies are bound to creep in the testimony of natural and reliable witnesses. The normal discrepancies in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected from the normal person. The normal discrepancies do not corrode the credibility of a party's case. {See State of Rajasthan Vs. Kalki 1981 Vol-11 SCC p752, Krishna Mochi Vs. Vs. State of Bihar 2002 (6) SCC p/81, Gungadhar Behera Vs. State of Orissa 2002 (8) SCC p/381. The contention of the learned counsel for defence is not tenable.

33. Whereas the motive is concerned, the learned Sessions Judge had already held that the Smt. Sharifan (CW-1) had not supported the prosecution case with regard to the motive. The Sessions Judge had rightly held that the prosecution could not prove the motive against the accused-appellants and further rightly had held that the mere fact that the prosecution had failed to prove any motive on the part of the accused to commit the crime, it would not reflect upon the credibility of the witnesses. It is well settled principle of law that if the evidence of witnesses is reliable, satisfactory and convincing then the absence of motive becomes irrelevant for the decision of the case. It is also well settled that establishment of motive is not sine quo non for proving the

prosecution case. It was held in Yunus Vs. State of M.P. SCC 2003 (1) p/429:-

> *"The prosecution in the present case has failed to prove the motive. Failure to prove motive for crime in our view is of no consequence. The role of the accused person sin the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is also well settled law that establishment of motive is not sine quo non for proving the prosecution case."*
>
> In the instant case, the role of the appellants in the commission of crime was clearly established by the ocular evidence hence the failure to prove the motive was of no avail.

34. The learned counsel for the appellants has contended that the evidence of the eye witnesses is not credible as they are related to each other. Although, it is true that the witnesses are related to each other but their evidence cannot be discarded on this ground alone. There is no rule of law or prudence which requires that the evidence of a close relation must be discarded for the simple reason i.e. they are related to each other. PW1 to PW4 (Mohd. Ishaq, Shafi Ahmed, Muzaffar Ai and Nazakat Ali respectively) must be interested to give their evidence so as to convict the appellants for their wrongdoings and they would not like to adopt a course by which some innocent person would be convicted in place of the person really guilty of the murder of the deceased. In such circumstances, it would not be just and proper to discard their evidence on account of their relationship with the deceased. The evidence of Mohd. Ishaq (PW-1) also stand corroborated by the FIR which was lodged at the police station promptly. The contention of the learned counsel for defence is not tenable.

35. The learned counsel for the appellants has lastly contended that the act was done in exercise of the right of private defence. He further pointed that the country-made pistol was found near the dead body of the deceased as indicated in the site plan but the I.O. had not seized the said

country-made pistol and he had not investigated how it was at the spot. The country-made pistol was lying nearby the body of the deceased. The statement of PW1 Mohd. Ishaq was referred in which it was stated that the deceased was involved in so many dacoity cases. The learned counsel has contended that he had the bad antecedents and it was also probable that he would have gone to the house of appellant Kalbe Ali with country-made pistol to eliminate the appellants. The learned counsel for the appellants contended that it was also probable in such circumstances the appellants exercised the right of private defence against the deceased. Failure to seize the countrymade pistol indicates only the remissness on the part of the investigating officer and the evidence of the prosecution would not be impaired in any way.

36. We may also consider the legal aspect of the plea relating to alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression “right of private defence”. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that they acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused have not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary

facts from the witnesses examined for the prosecution. The accused taking the plea of the right of private defence is not required to call evidence: they can establish their plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must have a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram Vs. Delhi Admn. AIR 1968 SC 702).

37. The learned counsel for the defence relied upon the ruling of the Apex Court reported in Vijayee Singh & others Vs. Stated of U.P. AIR 1990 SC p/1459; Kashi Ram & others Vs. State of M.P. AIR 2001 SC 2902 and Laxman Singh Vs. Poonam Singh & others AIR 2003 SC p-3204 in which it has been held that though Section 105 of the Evidence Act enacts a rule regarding burden of proof but is does not follow there from that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused perons recorded under section 313 Cr.P.C. or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case.

38. In the instant case, the ocular testimony of the witnesses prove the guilt of the accused beyond reasonable doubt. The learned counsel for the defence had clearly admitted in his argument that the appellants had not

taken the plea of self defence during the trial and even no suggestion had been put to any of the prosecution witnesses during trial and there was no plea of the appellant in his statement under Section 313 Cr.P.C. The learned counsel for the defence further admitted that no question or suggestion was put to any of the prosecution witnesses during the cross examination with regard to the countrymade pistol.

39. The I.O. did not make the recovery of the said countrymade pistol and it only indicate a remissness on the part of the investigating officer. The plea of the self-defence was not taken by the accused during the trial and there was no occasion to the Sessions Judge to deal with this aspect. The ocular testimony of the witnesses clearly prove as indicated above, that the appellant-Kalbe Ali had fired shot on the victim-deceased on exhortation of appellant-Anwar Hussain. Consequently, the victim died on the spot. It is also proved that both the appellants thereafter dragged the dead body of the deceased towards the house of the appellant-Kalbe Ali. If the deceased would have gone to the house of appellant-Kalbe Ali to eliminate him a submitted by the defence, it was natural that some scuffle would had taken place at the scene of the occurrence and there would have been some injuries on the person of appellant though it might be superficial. There were no injuries on the person of the appellants. The absence of such injuries on the appellants also indicate that the theory of self-defence is not probable and seems to be afterthought. The defence cannot take the benefit of the remissness of the I.O. as the prosecution has proved its case beyond reasonable doubt.

40. In Dhanaj Singh Alias Shera & others Vs. State of Punjab 2004 (3) SCC p/654, it was observed by the Hon’ble Supreme Court that in the instant case, the High Court found several disturbing features which indicated how the investigating officer had made out a new case to save the accused persons and to implicate the complainant party. Hence, the High Court analysed the evidence of the eye witnesses with due care and caution. On finding the said evidence to be credible, the High Court upheld the conviction recorded by the trial court. Before the Hon’ble

Supreme Court, the accused-appellants challenged the conviction on the grounds: (i) that the police after thorough investigation had concluded that it was the complainant party which caused the death of the deceased, (ii) that the pellets, wads and cartridges were not recovered from the spot, (iii) that the weapons of assault and the pellets were not sent for ballistic examination, (iv) that the blood stained earth was not sent for chemical examination, (v) that many persons who could have thrown light on the incident had not been examined, and (vi) that the evidence being that of highly interested and inimical persons, should have been discarded. Dismissing the appeal, it was held by the Hon'ble Apex Court that even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

41. It has been held in Chhotu Vs. State of Maharashtra 1997 CRI. L.J. 4394 (SC):-

> "*That necessarily means that all of them were the most natural and probable witnesses to an incident that then took place near his house, notwithstanding the fact that they were not residents of that locality. It also requires to be mentioned here that if the Investigating Officer failed to seize the bloodstained clothes of PWs 3 & 8 and to promptly examine PW3, whose name as any eye witness was disclosed immediately after the incident, it only indicates remissness on his part but the evidence of PWs3 & 8 was not in any way impaired thereby.*"

42. The Hon'ble Apex Court while maintaining the conviction of the appellant in Karnel Singh Vs. State of M.P. 1995 CRL. L. J. 4173, it has been obverted:-

"5. Notwithstanding our unhappiness regarding the nature of investigation, have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. Any Investigating Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the 'Chaddi'. That is the reason why we have said the investigation was slipshod and defective."

43. Apart from this, if the deceased went to the house of the appellant Kalbe Ali to kill him with counrymade pistol, it would have been the natural conduct of the appellant to lodge counter complaint against the deceased at the police station. There is no such case of the defence that the appellant went to the police station to lodge the report against the complainant party. Even no suggestion was given to the prosecution witnesses during trial. Thus the plea of self defence is afterthought. It has been held in Harjit Singh Vs. State of Punjab SCC (Cri) 2002 SCC 1527:-

"*Not much importance can be attached to the fact that there was serious lapse on the part of the investigating officer in not investigating the facts leading to the cause of injuries to the accused(A-1) and the other co-accused in the same incident. It has been admitted on behalf of the accused that they had not filed any counter-complaint or first information report against the members of the deceased party. There is no explanation for the same. Even if the accused was admitted in hospital, nothing prevented him or the other co-accused from lodging a report of commission of offence by the members of the deceased party. The plea of*

self-defence, therefore, is clearly an afterthought. The accused had suffered serious firearm injuries in the incident and could not possibly have denied his presence and participation in the incident. The accused (A-1) has, therefore, come up with the false plea of self defence which, for the aforesaid reasons we do not find worthy of acceptance. The conviction of the accused Harjit Singh (A-1), therefore, deserves to be maintained under Section 302 IPC for causing death of the deceased."

44. For the foregoing reasons, we are of the view that the evidence of the prosecution is credible and cogent and the prosecution has proved its case beyond reasonable doubt that the appellant-Kalbe Ali fired the rifle shot on Ashfaq Hussain by which Ashfaq Hussain died spontaneously at the spot. As such we are of the opinion that the appellant-Kalbe Ali committed the offence of murder punishable under section 302 IPC whereas the accused Anwar Hussain is concerned, the prosecution has proved its case beyond reasonable doubt that he was present at the shot and he had exhorted appellant-Kalbe Ali to fire upon the Ashfaq Hussain. When Ashfaq Hussain was shot dead at the spot by the appellant Kalbe Ali, both the appellants-Kalbe Ali and Anwar Hussain dragged the dead body of the deceased to the house of the appellant-Kalbe Ali. We are further of the opinion that appellants – Anwar Hussain and Kalbe Ali had a common intention to commit the murder of the deceased. As such we hold that appellant Anwar Hussain is guilty of the offence punishable under section 302 read with section 34 IPC.

45. For the reasons stated above, the appeal lacks merit. We dismiss the appeal. The conviction and sentences as awarded against the appellants by the learned Sessions Judge, Nainital per judgment and order dated 29.9.1984 are, therefore, upheld. The appellants are on bail. They shall be taken into custody forthwith and sent to jail to serve out the sentences awarded against them.

46. Let the record be sent back to the Sessions Judge, Nainital for necessary action and compliance and the report to be submitted within two months.

(J.C.S. Rawat, J.) **(Irshad Hussain, J.)**

(LSR)